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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re DAVID C., a Person Coming Under
the Juvenile Court Law.

H045891
(Monterey County
Super. Ct. Nos. 18JV000192,
18JV000193)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID C.,

Defendant and Appellant.

Appellant David C. admitted allegations in a Welfare and Institutions Code section 602¹ petition that he had possessed psilocybin² (Health & Saf. Code, § 11350) and had possessed psilocybin for sale (Health & Saf. Code, § 11351) and allegations in a section 777 (probation violation) notice that were largely related to his possession offenses. The

¹ Subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

² Psilocybin is the prohibited controlled substance in what are commonly known as psychedelic mushrooms.

juvenile court continued David as a ward and set a maximum term of confinement that included terms for both the simple possession and possession for sale counts.

On appeal, David contends that the juvenile court erred in accepting his admissions to both counts because the simple possession count was a lesser included offense of the possession for sale count. He also claims that the court violated Penal Code section 654 when it included terms for both counts in the maximum term of confinement because both counts were part of the same course of conduct. We reject his contentions and affirm the juvenile court's order.

I. Background

On February 21, 2018, a section 602 petition was filed alleging that on February 16, 2018, 16-year-old David had possessed psychedelic mushrooms for sale and had possessed psychedelic mushrooms. David previously had been declared a ward of the court in July 2017 after he was found to have committed numerous prior offenses. The section 602 petition was accompanied by a section 777 notice containing allegations that David had violated his probation for the prior offenses on February 16 by possessing "two . . . baggies containing psychedelic mushrooms" and "using mushrooms."

The February 21, 2018 detention report contained a description of David's offenses. "A search of David revealed 38.6 grams of psychedelic mushrooms in his backpack, \$105.00, and a pack of cigarettes." David admitted that these items were his. "A search of David's cellular phone revealed numerous photographs, text messages, and calls relating to drug sales." He also possessed "two fake urine tests." The detention report did not mention David's use of mushrooms.

At the February 22, 2018 detention hearing, David admitted the allegations in the section 602 petition and the allegations in the section 777 notice after the court told him

that his maximum time of confinement would be four years and 10 months.³ The court asked: “And do you admit to a factual basis, based upon the detention report?” David’s trial counsel replied: “So stipulated. With the amendment that any mention of ‘Oxycodone’ should, in fact, be ‘Hydrocodone.’” The court responded: “Okay. Thank you. Court finds a factual basis.” The detention report contained no references to “Oxycodone” or “Hydrocodone.” It was the section 777 notice that referred to “Oxycodone” in one of its allegations. David was detained pending the dispositional hearing.

A supplemental probation report was prepared for the dispositional hearing. This report noted that David had admitted using mushrooms and that the “fake urine tests” were “synthetic urine used to avoid any positive drug screens.” David’s parents told the probation officer that David had a substance abuse addiction problem. David described his wide ranging substance abuse to the probation officer. He explained that he “‘randomly’ uses mushrooms” along with a variety of other substances. David also told the probation officer that he used the synthetic urine “to avoid positive drug screens from his parents.”

At the uncontested dispositional hearing, the court continued David as a ward, committed him to the Monterey County Youth Center Program for 436 days with 71 days of credit for time served, and set his maximum term of confinement at four years and 10 months, which included terms for both possession offenses. David timely filed a notice of appeal from the juvenile court’s order.

³ David’s trial counsel agreed that this was David’s maximum time of confinement.

II. Discussion

A. Multiple Offenses

David claims that the juvenile court “erred” in “accept[ing] his admission” to both counts because the simple possession count was a lesser included offense of the possession for sale count. He insists that his claim raises a “pure question[] of law” that we resolve de novo.⁴

The Attorney General maintains that David’s claim “demands a factual analysis” and requires a substantial evidence review. He suggests that we review the juvenile court’s “implied finding” for substantial evidence that the two counts were based on “distinct acts.” The Attorney General argues that “substantial evidence” supports the juvenile court’s “determination that there was a factual basis” for two counts.

“[O]n appeal a judgment is presumed correct, and a party attacking the judgment, or any part of it, must affirmatively demonstrate prejudicial error.” (*People v. Garza* (2005) 35 Cal.4th 866, 881.) While we agree that it is a question of law whether, *in the abstract*, simple possession is a lesser included offense of possession for sale, that question is not the one that David asks us to resolve. Both David and the Attorney General agree that simple possession is, in the abstract, a lesser included offense of possession for sale. However, “the rule that a defendant may not be convicted of a greater and lesser offense applies *only when the crimes arise from the same conduct*.” (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1471, italics added; see also *People v. Sanders* (2012) 55 Cal.4th 731, 736 [rule barring both greater and lesser included offense

⁴ In a supplemental letter brief, David asserts that he “argued in his opening brief” that his admissions to both possession offenses “violated the Double Jeopardy Clause of the Fifth Amendment.” This assertion is not true. David made no mention of the Double Jeopardy Clause or the Fifth Amendment in his opening brief. We decline to entertain this claim because it was not raised in his opening brief nor was it within the scope of the briefing we solicited. (*In re Jose S.* (2017) 12 Cal.App.5th 1107, 1123, fn. 8; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

convictions applies only where both offenses arise “out of the same act or course of conduct”].) Consequently, David bears the burden on appeal of affirmatively demonstrating that his simple possession and possession for sale offenses “arise from the same conduct,” a question which cannot be resolved without examining the factual basis for his admissions.

The record before us does not support David’s claim.⁵ David admitted not only the two possession counts but also the section 777 allegations, and he stipulated that the detention report contained the factual basis for his admissions. While his admissions to the section 602 petition were unrevealing, the detention report combined with David’s section 777 admissions established the factual basis for his two possession offenses. On February 16, 2018, David possessed a large quantity of mushrooms (over 38 grams) that had been divided into two baggies. He admitted that he had used mushrooms himself that day, and his cell phone contained undisputed evidence that he intended to sell some of the mushrooms. The only reasonable inference that may be drawn from these facts is that David had divided the mushrooms into one baggie intended for his personal use and one baggie intended for sale. On this record, no other inference may reasonably be drawn from his division of such a large quantity of mushrooms into just two baggies. The fact that David also possessed “fake urine” further supported a conclusion that he intended to retain one of the baggies for his personal use in the future. David has failed to affirmatively demonstrate on this record that the juvenile court erred in implicitly concluding that his two possession offenses did not arise from the same conduct. The factual basis for his admissions supports the juvenile court’s implied finding that he possessed two separate baggies of mushrooms for two separate purposes. Even if de

⁵ We solicited supplemental briefing from the parties on the issue of whether there was a factual basis in the record for David’s admissions. We do not address this issue because David conceded that the juvenile court did not err in finding a factual basis for his admissions.

novo review were the appropriate standard, we would make the same finding. Accordingly, his simple possession offense was not a lesser included offense of his possession for sale offense.

Although David concedes that “the facts of the case” were not “further developed” due to his admissions, he relies heavily on *People v. Magana* (1990) 218 Cal.App.3d 951 (*Magana*), a case in which a defendant was *convicted by a jury* of both simple possession and possession for sale. The defendant had been found with numerous packets of drugs, and an expert testified at trial that all of the drugs were possessed for sale. The defendant testified at trial that the only drugs he possessed were for personal use. (*Magana*, at pp. 953-954.) On appeal, he challenged the dual convictions on the ground that one was a lesser included of the other. The Court of Appeal acknowledged that some of the drugs might have been possessed for sale and others for personal use but concluded that the simple possession count could not be upheld on that basis because the jury had not been instructed to make any findings on that point. (*Magana*, at p. 954.)

Magana is distinguishable. Here, since *the court* was accepting David’s admissions, there was no need for *jury* instructions on whether the two offenses arose from separate conduct. Unlike the situation in *Magana*, the evidence in this case indisputably established that a large quantity of mushrooms had been divided into two baggies and that David was both a user and a seller of mushrooms. Although David claims that the evidence does not show that he had divided the mushrooms into a bag for personal use and a bag for sale, this is the only reasonable inference that may be drawn from the undisputed factual basis for his admissions. It follows that the juvenile court did not err in accepting David’s admissions to both offenses because the factual basis reflected that the two offenses arose from separate conduct.

B. Penal Code section 654

David asserts that the juvenile court should not have included a term for the simple possession count in its calculation of the maximum term of confinement. He claims that the simple possession and possession for sale counts arose out of the same course of conduct within the meaning of Penal Code section 654. The Attorney General contends that substantial evidence supports the juvenile court's implied finding that David's "course of conduct was divisible—he entertained the distinct objectives of possessing contraband for personal use and for sale."

"The initial inquiry in any [Penal Code] section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) "The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

As we have already explained in our analysis of David's multiple convictions claim, the factual basis for his offenses disclosed that he possessed two separate baggies of mushrooms with the intent to sell one of the bags and the intent to retain the other bag for his personal use. These separate intents and objectives support the juvenile court's implied finding that Penal Code section 654 did not preclude separate punishment for each of the possession offenses.

III. Disposition

The juvenile court's order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Grover, J.

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